IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT K. DEAN, Appellant.	No. 31987-0-ii UNPUBLISHED OPINION

Hunt, J. — Robert K. Dean appeals his bench trial convictions for attempting to elude a pursuing police vehicle (eluding, count I) and driving under the influence (DUI, count II). He argues that the trial court erred (1) in denying his motion to dismiss the charges for failure to bring him to trial within 120 days of his request for disposition, as required by RCW 9.98.010, when the prison superintendent failed to forward Dean's notice to the prosecuting attorney;[1] and (2) in finding him guilty of eluding, because there was no evidence that the pursuing officer was in uniform, an element necessary to prove the crime. The State concedes that there was insufficient evidence to convict Dean on Count I.

Accepting the State's concession of error on the eluding charge, we reverse Dean's

[1] *See* Dean's Statement of Additional Grounds, RAP 10.10, and counsel's court-ordered response.

conviction on Count I. Holding that Dean was brought to trial within 120 days of the triggering event, notice to the Mason County Prosecutor, we affirm his conviction for DUI, Count II.

FACTS

Because we accept the State's concession of error on the eluding conviction, Count I, we do not recite the underlying facts of the officer's pursuit and Dean's arrest. Instead, we focus on the procedural facts relevant to Dean's challenge to the timeliness of his remaining DUI conviction, Count II.

On July 9, 2002, the State charged Robert Kyle Dean with one felony count of attempting to elude a pursuing police vehicle (count I) and one misdemeanor count of driving under the influence (DUI, count II).[2] The trial court arraigned Dean on July 18, 2002. Dean subsequently waived his CrR 3.3 speedy trial date through October 2002.

While awaiting trial in Mason County, Dean was arrested and held in custody on an unrelated matter in Pierce County. He was subsequently convicted of child molestation in Pierce County and sentenced to 75 months in prison.

On April 16, 2003, while incarcerated on the Pierce County conviction at the Washington Corrections Center (WCC) in Shelton, Dean filed a request, pro se, with the WCC superintendent for speedy disposition of his untried Mason County charges under RCW 9.98.010. Although represented by counsel, on May 5, Dean sent the superintendent a completed request form, titled, "Notice of Imprisonment and Request for Final Disposition of Untried Misdemeanor Indictment,

[2] These charges were filed in Mason County Superior Court. The State also charged Dean with resisting arrest and driving while license suspended, but the State dismissed these charges and filed an amended information alleging only counts I and II.

Information or Complaint." Clerk's Papers (CP) at 67. Dean addressed this form for forwarding to "[t]he *Municipal or District Court* County of Mason and [t]he Prosecuting Attorney or City Attorney for the city of Shelton." CP at 67 (emphasis added). On the form, Dean also provided the Mason County Superior Court cause number of the untried felony and misdemeanor charges.

The Mason County District Court received Dean's Notice on May 9, 2003, and filed the request with the Mason County Superior Court the same day. The record does not show that the WCC superintendent ever forwarded Dean's Notice to the Mason County Prosecutor's Office. Thus, the Prosecutor's Office did not receive Dean's Notice until February 4, 2004, approximately nine months after the Superior Court received it from the district court and shortly after Dean contacted the superior court directly.[3]

On February 26, 2004, Dean appeared on the DUI and eluding charges before the Mason County Superior Court. Trial was set for April 2004, to which Dean did not object. He requested a hearing on a motion to dismiss for failure to bring him to trial within 120 days of his request for speedy disposition under RCW 9.98.010. The court instructed Dean to file a formal motion so the State would have notice.

On March 24, 2004, Dean requested a continuance in order to prepare his motion to dismiss. Dean waived his speedy trial rights through August 2004. In granting the continuance, the trial court obtained stipulations from both parties that the time granted for the continuance

[3] On January 21, 2004, Dean wrote a letter to Mason Superior Court Judge Sheldon, asking the status of his request for speedy disposition of his untried charges. The court clerk received this letter on February 3, 2004, and apparently forwarded Dean's notice to the prosecutor's office the same day.

would not be used as a basis for dismissal for non-compliance with the 120-rule under RCW 9.98.010.[4]

On May 11, 2004, Dean formally moved to dismiss the charges under RCW 9.98.010. The trial court heard the motion on June 10, 2004, and denied it. The court specifically found that Mason County Superior Court had received Dean's Notice on May 9, 2003. As for the prosecutor's office's receipt of Dean's Notice, the court found:

> I, I don't know what the difficulty was in providing the notice to the prosecutor some time later than [May 9, 2003], February 3rd [20]04. But *the statute clearly sets out that it is the triggering date of the receipt of the notice to the prosecutor* that triggers the I think it's a 120-day timeframe instead of a 180 [day] timeframe to get the matter tried. The original notice that did come to the court was regarding an untried misdemeanor indictment. The court really does not have any responsibility in providing these forms to an inmate, and I don't know what responsibility DOC [Department of Corrections] has in providing a form to an inmate either. We don't have presentation of any evidence on that regard or any specific WACs or anything that indicates that the DOC is really to be acting as the inmate's attorney in selecting documents. The document that was selected was the incorrect document. It was not provided to the correct locations, specifically not provided to the prosecutor's office, and the Court will deny the motion to dismiss.

Report of Proceedings (RP) at 49-50 (emphasis added). The court also found that Dean was represented at the time he sought disposition of the untried Mason County charges and attempted to file the proper notice.

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[4] The prosecutor clearly stated that the State would not agree to a continuance if Dean intended to use such continuance to seek dismissal under RCW 9.98.010. In response, the court stated:

> Well, I think the record needs to be absolutely clear, and, the understanding needs to be that the facts as they exist right now either will support a motion for dismissal or they'll not support a motion for dismissal. But by seeking this continuance, we're not setting -- we're not trying to set up any additional time that would be utilized to say, well, now you're clearly outside of the 120 days.

Report of Proceeding (RP) at 24.

On June 16, 2004, Dean waived his right to a jury trial, and the matter proceeded to a bench trial on stipulated facts. The trial court reviewed the police reports, toxicology report, advisement of rights form, and Dean's statement to police. The court found Dean guilty on both counts.

Dean appealed. The State filed a Motion on the Merits, conceding the lack of proof that the pursuing officer was in uniform, a necessary element for conviction of felony eluding under RCW 46.61.024,[5] and requesting reversal of Dean's conviction on Count I. *See* Motion on the Merits Conceding.

Dean also filed a Statement of Additional Grounds,[6] raising the 120-day disposition issue. We asked appellate counsel to file supplemental briefs.

ANALYSIS

Citing RCW 9.98.010, Dean argues that the trial court erred in denying his motion to dismiss for failure to bring him to trial within 120 days of his request for disposition of the untried Mason County charges. This argument fails.

RCW 9.98.010 provides, in pertinent part:

> (1) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of this state, and whenever during the continuance of the term of imprisonment there is pending in this state any untried indictment, information, or complaint against the prisoner, *he shall be brought to trial within one hundred twenty days after he shall have caused to be delivered to the*

[5] Our independent review of the record supports the State's concession. As the State notes in its motion on the merits, the mere presence of police vehicles is insufficient evidence from which to infer that the pursuing officer is in uniform, a necessary element of the offense under RCW 46.61.024 ("The officer giving such a signal [to stop the vehicle] *shall be in uniform.*"). *State v. Hudson*, 85 Wn. App. 401, 403, 932 P.2d 714 (1997).

[6] RAP 10.10.

> *prosecuting attorney and the superior court* of the county in which the indictment, information, or complaint is pending written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: PROVIDED, That for good cause shown in open court, the prisoner or his counsel shall have the right to be present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the superintendent having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the indeterminate sentence review board relating to the prisoner.
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> (2) The written notice and request for final disposition referred to in subsection (1) hereof shall be given or sent by the prisoner to the superintendent having custody of him, *who shall promptly forward it together with the certificate to the appropriate prosecuting attorney* and superior court by certified mail, return receipt requested.
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> (3) The superintendent having custody of the prisoner shall promptly inform him in writing of the source and contents of any untried indictment, information, or complaint against him concerning which the superintendent has knowledge and of his right to make a request for final disposition thereof.

(Emphases added). If the defendant is not brought to trial on charges within the time frame mandated by RCW 9.98.010, no court has jurisdiction and the court must dismiss the untried charges with prejudice. RCW 9.98.020.

Our Supreme Court has held that "*actual receipt* by the prosecuting attorney and superior court of the county in which the indictment, information, or complaint is pending commences the 120-day period." *State v. Morris*, 126 Wn.2d 306, 313, 892 P.2d 734 (1995) (emphasis added). Furthermore, where, as here, "the prosecutor and the superior court receive notice on different days, the prosecutor's actual receipt of the request commences the 120-day period" because "[o]ur system assigns to the prosecutor, not the court, the responsibility of ensuring that

defendants are timely brought to trial." *Morris*, 126 Wn.2d at 314.[7]

Morris is dispositive. Dean was brought to trial on the Mason County charges on June 16, 2004, within 120 days of the prosecutor's receipt of his Notice on February 3, 2004, after subtracting the time period for Dean's March 24, 2004 requested continuance and waiver of the 120-day rule through August 2004.[8] Thus, Dean is not entitled to dismissal simply because the State allegedly failed to bring him to trial on the pending Mason County charges within 120 days of the prosecutor's receipt of his notice and request for disposition. We hold, therefore, that the trial court properly denied Dean's motion to dismiss the charges against him on this ground.

Dean also argues that we should dismiss his conviction because the State, acting through one department of the executive branch, namely the WCC superintendent, caused his (Dean's)

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[7] In *Morris,* our Supreme Court relied on the United States Supreme Court's decision in *Fex v. Michigan*, 507 U.S. 43, 113 S. Ct. 1085, 122 L. Ed. 2d 406 (1993), interpreting a similar provision of the Interstate Agreement on Detainers (IAD), in response to petitioner's argument that the result appears unfair. *Morris*, 126 Wn.2d at 313-14. *See also U.S. v. Collins*, 90 F.3d 1420, 1425-26 (9th Cir., 1996), cited in the Second Supplemental Br. of Resp't. at 4.

In holding that the time period under the IAD does not commence until the prisoner's request for final disposition has been delivered to the court and prosecutor in the appropriate jurisdiction, the Supreme Court noted, "Petitioner's 'fairness' and 'higher purpose' arguments are, . . . more appropriately addressed to the legislatures of the contracting States, which adopted the IAD's text." *Fex*, 507 U.S. at 52.

[8] Excluding the time for Dean's requested continuance, the 120-day period did not expire until July 21, 2004. The record shows that the State agreed to and the trial court granted Dean's requested continuance only on Dean's stipulation that this requested continuance period would not be counted in the 120-day period. Furthermore, it would have been error for the trial court to have counted Dean's requested continuance, granted within the 120-day period. *See State v. Johnson*, 79 Wn.2d 173, 177, 483 P.2d 1261 (1971) ("The continuance having been granted on the basis of the defendant's own request, he cannot now assert it was not granted for good cause, or that it was not necessary or reasonable. Under these circumstances the 120-day statutory period had not run.").

noncompliance with the 120-day rule when the superintendent failed to deliver to the prosecutor Dean's notice of request for final disposition of untried charges, as RCW 9.98.010(2) expressly requires. This argument also fails. Although Dean correctly asserts that RCW 9.98.010(2) places such duty on the WCC superintendent, this statute does not, however, specify a corresponding remedy when the superintendent fails to fulfill this statutory duty. And we decline Dean's request to create a judicial remedy where the Legislature has yet provided one.[9]

Accordingly, we affirm Dean's DUI conviction, count II, accept the State's concession, and reverse and dismiss Dean's conviction for attempting to elude a police vehicle, count II.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

[9] Although our deference to the Legislature leaves Dean without a cure for this executive branch oversight, such a remedy is for the Legislature to adopt if it sees fit, not for the courts.

Without condoning the WCC superintendent's failure, (1) we reject Dean's contention, unsupported by the record, that the WCC superintendent's failure to forward Dean's Notice to the prosecutor was in bad faith; (2) we note that, at oral argument, the State assured us that steps have been taken to remedy the circumstances that led to this oversight; and (3) we further note that the delay in Dean's Notice reaching the prosecutor's office apparently did not prejudice Dean because the Mason County court ordered Dean's DUI sentence to run consecutively with his 75-month sentence for his Pierce County conviction. Thus, Dean would not have been able to serve and to complete his Mason County DUI sentence any sooner even had the WCC superintendent delivered the Notice to the prosecutor in a timely fashion.

Bridgewater, J.

Van Deren, A.C.J.